



NEVADA COMMISSION ON ETHICS EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION REGARDING JUST AND SUFFICIENT CAUSE

REQUEST FOR OPINION NO. 06-23

SUBJECT: KEVIN PHILLIPS
MAYOR, CITY OF CALIENTE;
CHAIRMAN, JOINT COUNTY AND CITY
IMPACT ALLEVIATION COMMITTEE (JCCCIAC)

A. JURISDICTION:

In his capacity as Mayor of the City of Caliente, and Chairman of the Joint County and City Impact Alleviation Committee (JCCCIAC), Kevin Phillips is a public officer as defined by NRS 281.4365. As such, the Ethics Commission has jurisdiction over this complaint.

B. REPORT OF INVESTIGATIVE ACTIVITIES:

- Reviewed Jurisdictional Memorandum, RFO 06-23 (TAB B)
- Reviewed Request for Opinion 06-23 received April 20, 2006 (TAB C)
- Reviewed Kevin Phillips' response received May 8, 2006 (TAB D)
- Reviewed the trip itinerary entitled "Visit of the Mayor of Caliente, Valognes/La Hague, July 10-15, 2005" (Received with the Request for Opinion.) (TAB E)
- Reviewed Agenda and copy of the Minutes of the proceedings of the Board of Lincoln County Commissioners for its September 19, 2005 meeting (excerpted), (Received with the Request for Opinion.) (TAB F)
- Reviewed an interrogatory compiled by the Requester from e-mail correspondence between the Requester and COGEMA, Inc. (Received with the Request for Opinion.) (TAB G)
- Reviewed and verified the Nevada Financial Disclosure Statement filed by Mr. Phillips with the Secretary of State on January 12, 2006 (Received with the Request for Opinion.) (TAB H)

- Reviewed the October 1997 Memorandum of Understanding between Lincoln County and City of Caliente concerning the establishment of the “Joint County and City Impact Alleviation Committee” (JCCIAC) and other related documents obtained from the Lincoln County Government Internet website and Clerk’s Office (TAB I)
- Researched and reviewed information on COGEMA, Inc. and AREVA NC Inc. obtained through Internet websites (TAB J)
- Interviewed: Requester; Subject; City of Caliente Contract Attorney Gregory Barlow; Lincoln County District Attorney Philip Dunleavy

C. RECOMMENDATIONS:

Based on investigative activities, the senior investigator recommends the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.481 (1)

SPECIFIC REASON:

There are no allegations or credible evidence of fact that amounts to or supports a violation by any public officer of the above provision of NRS Chapter 281.

The senior investigator hereby recommends that the Panel find the just and sufficient cause **EXISTS** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.481 (2)
- NRS 281.571 (1)(e)

SPECIFIC REASON:

Sufficient credible evidence exists to support a finding of just and sufficient cause for the Commission to hear the matter and render an opinion on whether the subject of the complaint violated the above provisions of NRS Chapter 281.

D. SUMMARY OF REQUEST FOR OPINION:

The request for opinion, received April 20, 2006, alleges violations of NRS 281.481(1) and NRS 281.481(2) by Kevin Phillips, Mayor of the City of Caliente, and Chairman of the Joint County and City Impact Alleviation Committee (JCCIAC). The complaint alleges Mr. Phillips violated the Ethics in Government Law by accepting a gift that would tend to improperly influence a reasonable person in his position to depart from the

faithful and impartial discharge of his public duties as well as failing to report receiving the gift on his financial disclosure form as required by NRS 281.571(1)(e). Specifically:

- While acting in his official capacities as Mayor of the City of Caliente and as chairman of the JCCIAC, Mr. Phillips took a trip to Paris, France with his spouse on July 10 – 15, 2005;
- The trip was an educational trip intended to influence the attitude and decisions of public entities and officials with regards to spent nuclear fuel in the United States;
- The French company AREVA Enterprises, Inc., and its subsidiary COGEMA, Inc., which have been awarded nuclear waste contracts at Yucca Mountain, paid for the trip, meals, and a free day in Paris;
- The donor and the value of the trip were not disclosed on the Nevada Financial Disclosure Statement that Mr. Phillips filed with the Secretary of State on January 12, 2006.

E. SUMMARY OF SUBJECT'S RESPONSE:

In his response, Mr. Phillips requests that this complaint be dismissed because of the illogical and vague nature of the complaint and lack of evidence showing that Mr. Phillips departed from the faithful and impartial discharge of his duties. Specifically, Mr. Phillips provided the following information:

- The Nuclear Waste Policy Act was enacted in 1983 thereby creating an impact on Lincoln County and the City of Caliente in particular related to the transportation of spent nuclear fuel and waste from around the nation to the Yucca Mountain repository;
- The U.S. Government has long considered the City of Caliente to be a significant transportation hub for the transportation of spent nuclear fuel and waste;
- Gaining and maintaining a factual understanding of the handling, transportation, processing, and storage of spent nuclear fuel and waste and the impacts of such, has been and remains a high priority;
- The French company, COGEMA, is perhaps the world's largest handler of spent nuclear fuel with thousands of shipments moving through its facilities by ship, rail, and truck. COGEMA also operates one of the largest spent nuclear fuel recycling facilities in the world. They have an extensive public information program and invite officials from all over the world to tour their facilities;
- When the invitation came to see the COGEMA operation first hand and to visit with governmental leaders and emergency responders, Mr. Phillips accepted the invitation to improve and solidify his expanding knowledge. Under the circumstances, Mr. Phillips considers the information gained from the trip to be imperative in the faithful and intelligent discharge of his duty as Mayor;
- During a May 24, 2006 interview, Mr. Phillips stated that there was not an actual written invitation. The invitation came through his attending presentations and participating in panel discussions on nuclear waste

transportation and storage issues. While engaging the COGEMA representatives in discussion, Mr. Phillips was invited to tour their nuclear reprocessing facilities in France. Some time later, the COGEMA representatives reinitiated the invitation during another event that Mr. Phillips was attending. The invitation was for a delegation of up to six people. Mr. Phillips stated that he originally extended the invitation to members of the City Council and Lincoln County Commission, but schedules did not permit any members to attend. The final delegation included Mr. Phillips' spouse. They traveled first to England on personal business and returned to England to complete their personal business after the trip to France. Mr. Phillips stated that COGEMA paid for expenses such as lodging, meals, and transportation while the delegation was in France, but did not pay for transportation into or out of France;

- The U.S. Department of Energy awards the contracts at the Yucca Mountain facility, and the Mayor of Caliente has no authority to pass judgment on the awarding of any contracts for AREVA/COGEMA by any agency of the U.S. Government. The Mayor of Caliente has no authority over the actions or decisions of the U.S. Department of Energy regarding contracts at Yucca Mountain or the Nevada Test Site;
- This was an educational trip. When a reasonable person gains education, knowledge, facts, truth, understanding, and enlightenment, these things do and should influence decision-making. All leaders, elected or appointed, should make decisions based upon facts;
- Regarding the free meals and "free day in Paris," some meals or snacks or refreshments were provided at times, at other times they were not. Refreshments were served at a small reception with city staff and community leaders sponsored by the Mayor of the City of Valognes as well as two fire stations visited by Mr. Phillips, but no meals were provided on the "free day in Paris". Transportation out of the country could not be obtained during the "free day in Paris" because it was a major national French holiday with everyone being off work and the public transportation systems overloaded with the French leaving Paris for a long weekend out of the City;
- The learning and education gathered would tend to properly influence a reasonable person to more intelligently and wisely discharge his public duties; however, the Mayor of Caliente has never been in a position to decide on a contractual award to AREVA/COGEMA. Even if that were the case, the law would allow the Mayor to vote on the issue if the benefit derived was equal to all (NRS 281.501).
- Regarding the financial disclosure form, it did not occur to Mr. Phillips that this educational trip, months after his campaign, might be construed to be a "gift", and potentially require reporting. Mr. Phillips stated that if he misunderstood the reporting requirements, he will be happy to submit an amended disclosure form.
- In his written response, Mr. Phillips states that as the trip invitation was considered, Mr. Phillips consulted with the city attorney and asked if there was anything that would preclude Mr. Phillips from taking this trip;

- During a May 24, 2006 interview, Mr. Phillips further elaborated that he discussed the trip generally with the City attorney, but does not recall specifically discussing with the attorney who would be in the delegation;
- Since the Mayor is not in a position of authority to approve or disapprove contracts offered to AREVA/COGEMA by the U.S. Government, and since no business dealings have been or are being considered by the City with AREVA/COGEMA, it was reasonable for Mr. Phillips to accept the invitation to gain first-hand knowledge regarding the handling, transportation and storage of spent nuclear fuel from one of the world's leading experts. The trip was taken in the best interest of the City of Caliente and its residents.

F. PERTINENT STATUTES AND REGULATIONS:

NRS 281.481 General requirements; exceptions. A code of ethical standards is hereby established to govern the conduct of public officers and employees:

* * * * *

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.

(b) "Unwarranted" means without justification or adequate reason.

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NRS 281.571 Contents; distribution of forms; costs related to production and distribution of forms.

1. Statements of financial disclosure, as approved pursuant to NRS 281.541 or in such form as the Commission otherwise prescribes, must contain the following information concerning the candidate for public office or public officer:

* * * * *

(e) If the candidate for public office or public officer has received gifts in excess of an aggregate value of \$200 from a donor during the preceding taxable year, a list of all such gifts, including the identity of the donor and value of each gift, except:

(1) A gift received from a person who is related to the candidate for public office or public officer within the third degree of consanguinity or affinity.

(2) Ceremonial gifts received for a birthday, wedding, anniversary, holiday or other ceremonial occasion if the donor does not have a substantial interest in the

legislative, administrative or political action of the candidate for public office or public officer.

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G. RESULTS OF INVESTIGATION:

Factual History:

Kevin Phillips presently serves as Mayor of the City of Caliente and Chairman of the Joint County and City Impact Alleviation Committee (JCCIAC).

COGEMA Inc. is the world's largest provider of spent fuel reprocessing services and AREVA NC, Inc. is an affiliate of COGEMA. In 2003, COGEMA/AREVA signed a contract to design material-handling systems for the U.S. Department of Energy's Yucca Mountain Project. The contract is for operational design support for the repository's surface facility, where high-level nuclear waste will be received and prepared prior to placement in the Yucca Mountain repository.

The JCCIAC is an advisory committee and does not have any authority or influence regarding the current contract COGEMA/AREVA has for services at Yucca Mountain.

In his official capacity as Mayor of the City of Caliente and as a member of the JCCIAC, Phillips accepted an invitation from COGEMA, Inc. to tour its nuclear reprocessing facilities, and thereby traveled to France with a delegation from the City of Caliente comprised of the Mayor's spouse, City of Caliente Volunteer Fire Chief Steve Rowe and his spouse, and Achel "Ace" Robison and his spouse. The trip occurred from July 10 – 15, 2005. The purpose of the trip was to tour the COGEMA spent nuclear fuel reprocessing facilities located in and around Valognes and Cherbourg, France. COGEMA/AREVA paid for lodging, transportation, and several meals while the delegation was in France.

Mr. Robison is President of Robison/Seidler, Inc., a consulting firm through which Mr. Robison provides nuclear oversight program consulting services to Lincoln County. During a discussion at the September 19, 2005 Meeting of the Lincoln County Commission, Mr. Robison stated the following: AREVA of France paid for the trip; COGEMA has a contract at Yucca Mountain right now; Robison and the others who took the trip to France were invited for educational purposes; AREVA is firm in its resolve to change the U.S. attitude towards spent nuclear fuel; Robison met with COGEMA executives to discuss waste handling issues and intermodal transfer facilities and technologies.

During May 23 and May 25, 2006 interviews, City of Caliente Contract Attorney Gregory Barlow stated the Mr. Phillips had inquired whether taking the trip would be appropriate. Mr. Barlow advised Mr. Phillips that since COGEMA has no dealings with the City of Caliente, Mr. Barlow saw no conflict. Mr. Barlow stated that he was aware that a member of the Lincoln County Commission had been invited but declined. Mr.

Barlow further stated that he did not know who the other parties were, but he knew that some spouses were also going on the trip.

During a May 23, 2006 interview, Lincoln County District Attorney Philip Dunleavy stated that he advised County Commissioner George T. Rowe not to accept the invitation. Commissioner Rowe did not accept the trip. Mr. Dunleavy stated that he advised if the trip was a legitimate fact finding tour for the county government, the the county should pay for the county official to go. Mr. Dunleavy stated that it was his opinion that accepting the expenses paid trip for a county official and spouse would not be appropriate due to an appearance that the trip provider was attempting to buy influence. (Mr. Dunleavy's understanding is that COGEMA is presenting an alternative to Yucca Mountain deep storage.)

Allegations regarding NRS 281.481(1):

NRS 281.481(1) states:

“A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.”

In Opinion No. 00-54, the Commission stated:

“The intent of NRS 281.481, Subsection 1, is to prohibit a public officer or employee from violating the public trust by taking official action in exchange for a personal benefit (i.e., a “quid pro quo”), thereby departing from the faithful and impartial discharge of public duties. The Commission’s analysis in this matter involves a two-pronged factual determination: (1) whether [the public officer] sought or accepted a gift or service or favor or employment or engagement or emolument or economic opportunity, and (2) whether the gift or service or favor or employment or engagement or emolument or economic opportunity would tend improperly to influence a reasonable person in her position to depart from the faithful and impartial discharge of her public duties as [a public officer].”

The complaint alleges that a company that has nuclear waste contracts at Yucca Mountain gave Mayor Phillips a trip to France and free meals, all of which would tend to improperly influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.

There is no credible evidence in support of this allegation. At no time did Mayor Phillips possess any power, authority or influence to give the company any preferential treatment. The company has no dealings with either the City of Caliente or the JCCIAC, and Mayor Phillips has no authority or influence over the company’s contractual relationships regarding the Yucca Mountain Project. There is no evidentiary basis in support of the Commission further investigating this allegation.

Allegations regarding NRS 281.481(2):

NRS 281.481(2) states:

“A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) ‘Commitment in a private capacity to the interests of that person’ has the meaning ascribed to ‘commitment in a private capacity to the interests of others’ in subsection 8 of NRS 281.501.

(b) ‘Unwarranted’ means without justification or adequate reason.”

In Opinion Nos. 01-08A & 01-08B, the Commission stated:

“On its face, NRS 281.481, Subsection 2, reasonably appears to require the Commission to apply a two-prong test to determine whether a public officer has violated the statute. First, the Commission must find that a public officer’s official conduct benefited some person or business entity. Then the Commission must find that the public officer intended such conduct to so benefit the person or business entity.”

The complaint alleges that a company that has nuclear waste contracts at Yucca Mountain gave Mayor Phillips a trip to France and free meals. By virtue of his position, Mayor Phillips was offered a privilege that would not otherwise have been granted. Although the privilege offered to Mayor Phillips may have been warranted, the question is whether Phillips granted an unwarranted privilege to a member of his household when he chose to include his spouse in the delegation. The Mayor’s conduct was intended and did, in fact, benefit a member of his household

Based on the above investigative activities and analysis, the senior investigator believes sufficient credible evidence exists for the panel to recommend the full Commission hold a hearing and render an opinion regarding whether Phillips violated NRS 281.481(2). In doing so, the Commission will be able to render an opinion regarding the conduct of Mayor Phillips in relation to this issue and whether or not such conduct rises to the level of a violation of state law.

Allegations regarding NRS 281.571(1)(e):

NRS 281.571(1)(e) states:

“Statements of financial disclosure, as approved pursuant to NRS 281.541 or in such form as the Commission otherwise prescribes, must contain the following information concerning the candidate for public office or public officer:

* * * * *

(e) If the candidate for public office or public officer has received gifts in excess of an aggregate value of \$200 from a donor during the preceding taxable year, a list of all such gifts, including the identity of the donor and value of each gift, except:

(1) A gift received from a person who is related to the candidate for public office or public officer within the third degree of consanguinity or affinity.

(2) Ceremonial gifts received for a birthday, wedding, anniversary, holiday or other ceremonial occasion if the donor does not have a substantial interest in the legislative, administrative or political action of the candidate for public office or public officer.”

If the trip and meals received by Mayor Phillips qualifies as a “gift” for purposes of NRS 281.571, Subsection 1(e), then the donor and the value of the gift should have been reported on the Mayor’s Financial Disclosure Statement filed with the Secretary of State on January 12, 2006. In his response, the Mayor stated: “If I misunderstood the particulars and this should be reported, I’ll be happy to submit an amended disclosure form.”

Based on the above investigative activities and analysis, the senior investigator believes sufficient credible evidence exists for the panel to recommend the full Commission hold a hearing and render an opinion regarding whether Phillips violated NRS 281.571(1)(e). In doing so, the Commission will be able to render an opinion regarding the conduct of Mayor Phillips in relation to this issue and whether or not such conduct rises to the level of a violation of state law.

H. CONCLUSION:

The senior investigator hereby recommends the panel find no just and sufficient cause exists for the Commission to hold a hearing and render an opinion on the allegations that the subject violated NRS 281.481(1), and further that the allegations regarding NRS 281.481(1), be dismissed.

The senior investigator hereby recommends that the panel find that just and sufficient cause does exist for the Commission to hold a hearing and render an opinion on the allegations that the subject violated NRS 281.481(2) and NRS 281.571(1)(e).

DATED: May 25, 2006

Matthew C. DiOrio
MATTHEW C. DIORIO
SENIOR INVESTIGATOR